Supreme Court, U.S.
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No. 02-220

IN THE

Supreme Court of the United States

CARMEN HOOKER ODOM, Secretary, NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Petitioners,

v.

SAMUEL ANTRICAN, Minor, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) In this action for injunctive and declaratory relief against Petitioner State Medicaid officials sued in their official capacity, was the Fourth Circuit Court of Appeals correct in holding that under *Ex parte Young* the Eleventh Amendment does not bar the suit and that the District Court correctly denied defendants' motion to dismiss on that ground?

(2) In an interlocutory appeal authorized because the State Medicaid officials moved to dismiss based on Eleventh Amendment immunity, was the Fourth Circuit Court of Appeals correct in refusing to exercise pendant appellate jurisdiction to review claims by the State Medicaid officials on the merits and that are currently pending before the District Court in a separate motion to dismiss?

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STATEMENT OF THE CASE

This case is a routine action brought by several Medicaid beneficiaries against State Medicaid officials in their official capacity. The Complaint alleges ongoing violations of six specific federal Medicaid Act provisions and seeks only prospective declaratory and injunctive relief. Hundreds of such cases have been adjudicated under *Ex parte Young*, 209 U.S. 123 (1908) by the federal courts since the passage of the Medicaid Act in 1965 without any successful challenges under the Eleventh Amendment.

The state officials filed a motion to dismiss the plaintiffs' complaint under Fed. R. Civ. P. 12(b)(1), asserting Eleventh Amendment immunity, and under Fed. R. Civ. P. 12(b)(6), asserting failure to state a claim under 42 U.S.C. § 1983 upon which relief can be granted. On April 17, 2001, North Carolina District Judge Malcolm J. Howard denied the Eleventh Amendment motion to dismiss and granted in part and denied in part the Rule 12(b)(6) motion to dismiss. *See* Petitioners' Appendix (Pet. App.) at 21a-36a; 158 F. Supp. 2d 663 (E.D.N.C. 2001). Specifically, the District Court found that the plaintiffs could enforce all of the provisions cited in their complaint except 42 U.S.C. § 1396a(a)(24) (regarding freedom of choice of Medicaid-participating providers). The plaintiffs did not appeal this decision, because a final judgment has not been entered.

The State officials filed an interlocutory appeal from the denial of Eleventh Amendment immunity with the Fourth Circuit Court of Appeals. They also asked the District Court to certify the other issues in the case to the Circuit Court, but the motion was denied. Pet. App. at 37a. The State officials did not appeal the denial of certification. Instead,

they attempted to have the Circuit Court exercise pendant appellate jurisdiction over the rulings on the merits made by the District Court by claiming that the merits were inextricably intertwined with the Eleventh Amendment issues.

In a unanimous opinion written by Judge Niemeyer, the Fourth Circuit affirmed the District Court's order denying the State officials' motion to dismiss the case on the basis of Eleventh Amendment immunity. Pet. App. at 1a-20a; 290 F.3d 178 (4th Cir. 2002). The Circuit Court declined to consider the other jurisdictional issues raised by the State officials or whether the plaintiffs have a cause of action under § 1983 to enforce the five remaining Medicaid Act provisions cited in their Complaint. The case was returned to the District Court in May 2002. On July 17, 2002, the State officials filed another motion to dismiss pursuant to Rule 12(b)(6), claiming that the Medicaid Act is not enforceable under § 1983, and that fully-briefed motion is now pending before the District Court.

REASONS FOR DENYING THE PETITION

The Petition has not presented any compelling reasons for this Court to exercise discretionary jurisdiction over the Fourth Circuit Court of Appeals decision affirming the District Court's denial of the motion to dismiss. *See* Sup. Ct. R. 10 ("A petition for writ of certiorari will be granted only for compelling reasons."). Petitioners raise several issues, but there is no conflict in the circuits on those issues. At bottom, petitioners simply disagree with the Fourth Circuit's refusal to expand the scope of their Eleventh Amendment interlocutory appeal and of Eleventh

Amendment immunity. In any event, petitioners' arguments are directly contrary to longstanding and recent precedent from this Court.

I. THERE IS NO CONFLICT IN THE CIRCUITS REGARDING WHETHER THE MEDICAID ACT PROVISIONS AT ISSUE HERE ARE ENFORCEABLE UNDER *EX PARTE YOUNG*.

Since the passage of the Medicaid Act in 1965, the federal courts have allowed suits by Medicaid beneficiaries against state officials in their official capacity for prospective enforcement of the federal Medicaid statute. There are literally hundreds of such cases, many of which have been reported. In addition, under the identical statutory framework of the former program of Aid to Families with Dependent Children, this Court, as well as the lower federal courts, also enforced that title of the Social Security Act through prospective relief against state officials. *See, e.g., Blum v. Bacon*, 457 U.S. 132 (1982); *Carleson v. Remillard*, 406 U.S. 598 (1972); *Townsend v. Swank*, 404 U.S. 282 (1971); *Rosado v. Wyman*, 397 U.S. 397, 422-23 (1970); *King v. Smith*, 392 U.S. 309 (1968).

These decisions establish that the Eleventh Amendment is no bar to injunctive relief in suits brought against state officials. These decisions do not mean that every claim of a violation of the Medicaid Act is adjudicated on the merits in federal court. This Court has made it clear that not every violation of federal law is also a violation of federal "rights" which are enforceable under § 1983. *See Gonzaga University v. Doe*, 122 S. Ct. 2268 (2002); *Blessing v. Freestone*, 520 U.S. 329 (1997). The lower courts have applied this admonishment and have declined in a number of instances

to allow Medicaid suits to proceed on the merits, finding that no "rights" are involved. *See, e.g., Harris v. James*, 127 F.3d 993 (11th Cir. 1997) (regarding 42 U.S.C. § 1396a(a)(4), requiring "methods of administration" necessary for proper administration); *Cook v. Hairston*, 948 F.2d 1288 (6th Cir. 1991) (case table) (regarding § 1396a(a)(19), requiring provision of services consistent with "best interests" of recipients). In other cases, the courts have found enforceable rights were involved in Medicaid cases and adjudicated the merits. *See, e.g., Evergreen Presbyterian Ministries v. Hood*, 235 F.3d 908 (5th Cir. 2000) (allowing Medicaid beneficiaries to enforce 42 U.S.C. § 1396a(a)(30)(A), requiring Medicaid payments sufficient to enlist providers); *Doe v. Chiles*, 136 F.3d 709 (11th Cir. 1998) (allowing enforcement of § 1396a(a)(8), requiring "reasonable promptness" of medical assistance). But none of these decisions challenge the well-accepted holding that the Eleventh Amendment is not a bar to *Ex parte Young* cases for prospective relief. Petitioners identify no conflict in the circuits on these issues, and their arguments fail on the merits in any event.

The Fourth Circuit addressed and rejected each of the seven reasons asserted by the North Carolina officials for not applying the *Ex parte Young* exception to Eleventh Amendment immunity. The Petition for Certiorari contains exposition regarding each of the reasons advanced below but appears to claim reversible error on only two grounds.[1]

1. The Petition mentions that an order to "spend more money" goes beyond *Ex parte Young*. Pet. at 12. But in this case, the Fourth Circuit correctly held that the issue is not whether the state has to pay money but whether the relief is retrospective or prospective and that the relief requested in this case is clearly prospective. Pet. App. at 8a-10a (citing *Milliken v. Bradley*, 433 U.S. 267 (1997); *Edelman v. Jordan*, 415 U.S. 651 (1974)).

First, the petitioners attack the Fourth Circuit's decision finding "no merit" to the argument that Congress provided a remedial scheme in the Medicaid Act that displaces any *Ex parte Young* action. Simply reading the opinion dispels the petitioners' argument, Pet. at 11, that the Fourth Circuit erroneously applied the test from *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990). Rather, the Fourth Circuit properly articulated the correct test when it applied *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). The Circuit Court cites *Wilder* as an analogous case in which the Court had concluded that the Medicaid Act did not contain a comprehensive remedial scheme. *See* Pet. App. at 18a-19a. *See also Md. Psychiatric Soc'y v. Wasserman*, 102 F.3d 717, 719 (4th Cir. 1996) (rejecting the argument that the Medicaid Act has a detailed remedial scheme evidencing congressional intent to foreclose *Ex parte Young* actions).

Verizon Md. Inc. v. Public Serv. Comm'n of Md., 122 S. Ct. 1753 (2002), confirms that the decision below was the correct one. Applying *Seminole Tribe*, *Verizon* asks whether the limitations on judicial remedies, if any, imposed by the underlying statute sought to be enforced foreclose judicial remedies available under *Ex parte Young*. The Medicaid Act provision cited by the petitioners, 42 U.S.C. § 1396c, does not establish any limitations on judicial remedies or even address the federal court's authority. Every circuit court that has looked at whether the Medicaid Act contains a remedial scheme that meets the *Seminole Tribe* standard has agreed with the Fourth Circuit that it does not. *See Frazar v. Gilbert*, 300 F.3d 530, 550-51 (5th Cir. 2002);[2] *Westside Mothers v.*

2. Petitioners misstate the holding of *Frazar*. The *Frazar* court held neither that "EPSDT creates no federal rights," Pet. at 6, nor that "it cannot be the basis for an action under the *Ex parte Young* (Cont'd)

Haveman, 289 F.3d 852 (6th Cir. 2002), *Lewis v. N.M. Dep't of Health*, 261 F.3d 970 (10th Cir. 2001). The Petitioners cite *Joseph A. ex rel. Wolfe v. Ingram*, 262 F.3d 1113 (10th Cir. 2001), in support of their argument, but that case was withdrawn and vacated by the substituted opinion published at 275 F.3d 1253 (10th Cir. 2002) (holding that the funding termination provisions of Title IV-E of the Social Security Act did not create a detailed remedial scheme that supplants *Ex parte Young*). *See also Missouri Child Care Ass'n v. Cross*, 294 F.3d 1034, 1037-40 (8th Cir. 2002) (same).

Second, the Petition claims that the Fourth Circuit erred when it rejected the State officials' argument that the Medicaid Act, as Spending Clause legislation, is not "supreme" federal law but rather a contract that lacks the power of compulsion. Pet. at 13a-14a. However, the Fourth Circuit properly applied long-standing Supreme Court precedent to reach its conclusion. *See* Pet. at 13a-14a (citing *Harris v. McRae*, 448 U.S. 297, 301 (1980); *Dalton v. Little Rock Family Planning Services*, 516 U.S. 474, 478 (1996)). *See also Bennett v. Kentucky Dep't of Education*, 470 U.S. 656, 669 (1985) ("Unlike normal contractual undertakings, federal grant programs originate in and remain governed by statutory provisions expressing the judgment of Congress concerning desirable public policy."). Moreover, there is no circuit split on this point as every court hearing this argument

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(Cont'd)
doctrine." *Id.* That court recognized that EPSDT provisions might create judicially enforceable rights but held that provisions of the consent decree enforced by the district court went beyond what was necessary to provide a remedy for violation of such rights. Whether or not the *Frazar* court's holding regarding a district court's jurisdiction to enforce a consent decree is correct, that holding raises no conflict with the Fourth Circuit's decision here.

has rejected it. *See Frazar v. Gilbert*, 300 F.3d 530, 550 (5th Cir. 2002); *Westside Mothers v. Haveman*, 289 F.3d 852 (6th Cir. 2002); *Missouri Child Care Ass'n v. Cross*, 294 F.3d 1034 (8th Cir. 2002). *See also Elizabeth Blackwell Health Center for Women v. Knoll*, 61 F.3d 170, 178 (3d Cir. 1995) ("[t]he Supremacy Clause requires invalidation of any state constitutional or statutory provision that conflicts with federal law and compels compliance by participants in Title XIX federal aid programs with federal law and regulations"); *Pharmaceutical Research and Mfrs. of Am. v. Concannon*, 249 F.3d 66, 75 (1st Cir. 2001) (considering whether state statute conflicted with Medicaid so as to be invalid under Supremacy Clause); *Concourse Rehab. & Nursing Center, Inc. v. Whalen*, 249 F.3d 136, 146 (2d Cir. 2001) (same); *Lewis v. Hegstrom*, 767 F.2d 1371, 1375 (9th Cir. 1985) (it is a "settled proposition that state regulations which are inconsistent with federal [Medicaid] law are invalid under the Supremacy Clause"); *Randall v. Lukhard*, 729 F.2d 966 (4th Cir. 1984) (en banc) (adopting holding from *Randall v. Lukhard*, 709 F.2d 257, 264 (1983), that state rule was invalid because it conflicted with the Medicaid Act); *Hern v. Beye*, 57 F.3d 906, 913 n.6 (10th Cir. 1995) (affirming injunction prohibiting enforcement of state law "to the extent it conflicts with federal Medicaid law"); *Hodgson v. Board of County Commissioners*, 614 F.2d 601, 611 (8th Cir. 1980) (state law is "inconsistent with and superseded by Title XIX"); *Hope Medical Group for Women v. Edwards*, 63 F.3d 418, 428 (5th Cir. 1995) (affirming injunction prohibiting enforcement of state law conflicting with Medicaid); *Zbaraz v. Quern*, 596 F.2d 196, 202 (7th Cir. 1979) (remanding with instructions to enjoin enforcement of state law to extent it conflicted with Medicaid). *See also Barnes v. Gorman*, 122 S. Ct. 2097, 2102 n.2 (2002) ("We do not imply, for

example, that suits under Spending Clause legislation are suits in contract, or that contract-law principles apply to all issues that they raise.")

II. PETITIONERS' EFFORT TO EXPAND THE SCOPE OF THEIR ELEVENTH AMENDMENT INTERLOCUTORY APPEAL IDENTIFIES NO SPLIT IN THE CIRCUITS AND IS FORECLOSED BY THIS COURT'S PRECEDENT.

Congress and this Court have established the process for appeal of lower court decisions. In general, appeals lie only from a final judgment. 28 U.S.C. § 1292. Interlocutory appeals are permissible in certain limited situations. 28 U.S.C. §§ 1292(a), 1292(f). The Rule 12(b)(6) grounds on which the State officials supported their motion to dismiss the Complaint meet none of the exceptions. 28 U.S.C. § 1292(b) gives the district courts circumscribed authority to certify interlocutory orders for immediate appeal if deemed pivotal by the district court. Here, the district court, in its discretion, refused certification of the Rule 12(b)(6) matters. Pet. App. at 37a.

The State officials did not appeal the certification order. Rather, they petitioned the Circuit Court to exercise pendant jurisdiction over the Rule 12(b)(6) issues under the collateral order doctrine. The Fourth Circuit properly applied *Swint v. Chambers County Comm'n*, 514 U.S. 35 (1995) to reject the request summarily, finding that the other issues in this case are neither "inextricably intertwined" with the Eleventh Amendment immunity claims nor "necessary to ensure meaningful review of the . . . immunity question." Pet. App. at 20a. The Petition offers no compelling reason for disturbing the Circuit Court's ruling, and it is entirely

consistent with this Court's previous instruction. *See Swint*, 514 U.S. at 45 ("If courts of appeal had discretion to append a *Cohen*-authorized appeal from a collateral order further rulings of a kind neither independently appealable nor certified by the district court, then the two-tiered arrangement § 1292(b) mandates would be severely undermined."); *Id.* at 48 ("The procedure Congress ordered for such changes [expansions of the list of orders appealable on an interlocutory basis], however, is not expansion by court decision, but by rulemaking under § 2072.")

Indeed, the arguments require application of different legal principles. The petitioners' sovereign immunity claim, based on Fed. R. Civ. P. 12(b)(1), is decided under different standards than a Rule 12(b)(6) motion. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998) ("It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject matter jurisdiction."). *See also Lewis v. N.M. Dep't of Health*, 261 F.3d. 970, 979 (10th Cir. 2001)

> [W]hether the plaintiffs have failed to state a [Medicaid Act] claim upon which relief may be granted is not inextricably intertwined with our jurisdictional analysis under *Ex parte Young* and the Eleventh Amendment. Simply stated, Rule 12(b)(6) and the *Ex parte Young* doctrine are two distinct inquiries requiring the application of different standards.

Petitioners do not directly challenge the Fourth Circuit's application of *Swint*. Instead, they make a novel argument that was not presented to the court of appeals. They contend that the merits of a plaintiff's underlying claims are always

inextricably intertwined with the question of federal jurisdiction under *Ex parte Young*. The logic of their argument is as follows: *Ex parte Young* is available only where necessary to stop an ongoing violation of federal law; where the plaintiff's claim of a violation of federal law fails on the merits, there is accordingly no basis for federal jurisdiction under *Ex parte Young*.

Petitioners' argument — which has not been adopted by any court of appeals — ignores the fundamental difference, long recognized by this Court, between questions of jurisdiction and questions of the validity of a cause of action. *See, e.g., Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979). Just last Term, this Court rejected a virtually identical argument by a state defendant and held that "[t]he inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim." *Verizon*, 122 S. Ct. at 1761. *Verizon* is dispositive of petitioners' claim. And the rule could hardly be otherwise: If a district court must satisfy itself that the plaintiff has a good cause of action in order to have *jurisdiction* under *Ex parte Young*, then *any* denial of a 12(b)(6) motion by a state defendant necessarily raises an Eleventh Amendment issue that will be subject to review on an interlocutory appeal.

Nor is there any split in the circuits on this issue. The petitioners erroneously argue that there is a split between the Fourth Circuit (*Antrican*) and Sixth Circuit (*Westside Mothers*), on the one hand, and the Fifth Circuit (*Frazar*), on the other. However, there is no split because *Frazar* does not support the petitioners' argument. If *Frazar* were applying the test recommended by the State officials, the Fifth Circuit would not have reached, and subsequently rejected, the sovereign immunity arguments. Rather, the Fifth Circuit has

expressly required questions of Eleventh Amendment sovereign immunity to be confronted first and, only if no bar is found, will the judicial power of the court be employed to interpret statutory text. *See, e.g., United States of America ex rel. Foulds v. Texas Tech. Univ.*, 171 F.3d 279, 285-88 (5th Cir. 1999).

III. THE PETITION INCLUDES QUESTIONS THAT WERE NOT PRESENTED TO THE COURTS BELOW AND THAT SHOULD NOT BE DECIDED ON FIRST IMPRESSION BY THIS COURT.

The Petition raises for the first time a number of questions regarding the enforceability of the provisions cited in the Complaint.[3] They argue, first, that *Frazar v. Gilbert*, 300 F.3d 530 (5th Cir. 2002), created a split with the Fourth Circuit on the question of whether one of the claims, involving the Medicaid Early and Periodic Screening, Diagnosis and Treatment (EPSDT) provisions, can be enforced pursuant to § 1983. Pet. at 8. There is no split. The Fourth Circuit specifically refused to rule on this question, finding it was not "inextricably intertwined" with the sovereign immunity issues. Pet. App. at 20a.

Furthermore, the holding in *Frazar* does not support the petitioners' argument. *Frazar* held that violation of a consent decree does not suffice to confer *Ex parte Young* jurisdiction;

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3. There is no record on these issues, and deciding them now raises the danger of this Court issuing a decision that is based on inaccuracies. For example, the Petition cites two Medicaid Act provisions as unenforceable by the plaintiffs, 42 U.S.C. § 1396c(2) and the EPSDT participation goals of § 1396d(r). Pet. at 18-19. However, the plaintiffs in this case are not seeking to enforce either of these provisions.

rather, the plaintiff must allege that violation of the consent decree also violates some independent prohibition of federal law. And by the conclusion of the proceeding, the court must find an actual violation of federal law or it cannot enforce an injunction. In *Frazar*, after development of a full evidentiary record, the district court tried to enforce an injunction without finding such a violation. *Antrican* does not involve the propriety of a district court's ultimate enforcement of an injunction but rather involves the question whether the district court's jurisdiction depends *ab initio* on whether the plaintiffs can show that they have a good cause of action. As the Court made clear in *Verizon*, the district court's jurisdiction depends on whether the complaint alleges an ongoing violation of federal law and seeks prospective relief, and this determination does not include an analysis of the merits of the claim. 122 S. Ct. at 1761.

Second, the Petition asks the Court to apply the holding of *Gonzaga University v. Doe*, 122 S. Ct. 2268 (2002), to find that none of the statutory provisions at issue in this case are enforceable under § 1983. Pet. at 17-18. Neither the Fourth Circuit nor the District Court decided these questions. The State officials' Rule 12(b)(6) motion to dismiss the case as unenforceable under § 1983, citing *Gonzaga*, is now pending before the District Court. This Court should allow the lower courts the first opportunity to resolve these disputes raised by the State officials' contentions.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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